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In the Supreme Court of the United States

OCTOBER TERM, 1985

OHIO NEW AND REBUILT PARTS, INC., ET AL.,
PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether the National Labor Relations Board's performance appraisal and compensation system for Regional Directors, promulgated under the Senior Executive Service provisions of the Civil Service Reform Act of 1978, creates an unconstitutional risk of bias in the Board's administrative process by including the timeliness with which cases are processed among a number of factors to be considered in evaluating a Regional Director's performance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 760 F.2d 1443. The decisions of the National Labor Relations Board (Pet. App. 36-63, 64-84, 85-101) are reported at 267 N.L.R.B. 420, 269 N.L.R.B. 289, and 268 N.L.R.B. 613.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1985. The petition for a writ of certiorari was filed on July 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 1101 *et seq.*, are set forth at Pet. App. 102-135.

STATEMENT

The National Labor Relations Board found that petitioners Canton Health Care Center, Inc., and Colonial Gardens Care Center, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with unions that had been certified as representatives in appropriate bargaining units following Board-conducted elections. The Board also found that petitioner Ohio New and Rebuilt Parts, Inc., violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging and suspending employees and coercively interrogating and threatening employees during a representation campaign. Based on the serious and pervasive nature of the unfair labor practices found and the union's card majority, the Board issued a bargaining order. Petitioners do not directly challenge either the findings or legal conclusions underlying the Board's orders. Petitioners challenge the orders solely on the ground that the Board's performance appraisal and compensation system for Regional Directors, promulgated under the Senior Executive Service provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 1101 *et seq.*, creates an unconstitutional risk of bias in the Board's administrative process by including the timeliness with which cases are processed among a number of factors to be considered in the evaluation of a Regional Director's performance.

1. a. In Title IV of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 3131 *et seq.*, Congress created the Senior Executive Service (SES) and included therein most of the top executive positions in the federal service in order to develop "the most highly motivated and highly competent Federal Service leadership possible" (S. Rep. 95-969, 95th Cong., 2d Sess. 67 (1978)).[1] The central feature of

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[1]SES positions are defined in 5 U.S.C. 3132 as those senior executive positions not required to be filled by a presidential appointment in

the SES program is a comprehensive performance appraisal system and a compensation program of monetary awards based on merit that may be added to the executive's base salary (see 5 U.S.C. (& Supp. II) 3131, 5384). Among the statutory purposes of the SES performance appraisal system are to "encourage excellence in performance by senior executives" and to "permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position" (5 U.S.C. 4312(a)(3) and (1)). In 5 U.S.C. 4313, Congress mandated that appraisals take into account factors such as: (1) improvements in efficiency, productivity, and quality of work, including significant reductions in paperwork; (2) cost efficiency; (3) timeliness of performance; (4) meeting affirmative action goals and equal employment opportunity requirements; and (5) indications of the effectiveness, productivity, and performance of employees for whom the executive is responsible.

The statutory scheme requires each federal agency, subject to the approval of the Office of Personnel Management (OPM), to designate those positions that are to be SES positions and to design an appropriate performance appraisal system for such positions (5 U.S.C. (& Supp. II) 3133, 4312-4314). The agency must provide an annual summary rating of an executive's performance, and the rating system is required to include one or more "fully successful" levels, a "minimally satisfactory" level, and an "unsatisfactory" level

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which an employee: (1) directs the work of an organizational unit; (2) is responsible for the success of one or more programs or projects; (3) maintains progress toward organizational goals and periodically evaluates and makes adjustments in the pursuit of such goals; (4) supervises the work of employees other than assistants; or (5) otherwise exercises important policy-making or executive functions. Generally, SES positions are those executive positions in the federal salary structure above the rank of GS-15 on the General Schedule and below Level IV of the Executive Schedule (see 5 U.S.C. (& Supp. II) 5382).

(5 U.S.C. 4314(a)). An executive who receives a fully successful rating may be eligible for a performance award of up to 20% of his base salary, but no more than 50% of the SES executives in any agency may receive a performance award in a given year (5 U.S.C. (& Supp. II) 5384(b)(2), (3)). An executive who receives an unsatisfactory rating must be transferred or reassigned; in certain cases of unsatisfactory performance, he must be removed from the SES program altogether (5 U.S.C. 4314(b)(3), (4)).

b. Pursuant to 5 U.S.C. 3133, the Board has designated the position of Regional Director as a "career reserved" SES position (Pet. App. 187).[2] Under the direction of the Board's General Counsel, Regional Directors supervise a staff of attorneys and field examiners in the processing of representation and unfair labor practice cases. Regional Directors are empowered to issue and prosecute complaints in unfair labor practice cases and to obtain settlement in such cases. They are also authorized to direct and conduct elections in representation cases, including certification of results, to investigate and report on or decide election objections and challenged ballots, and to issue certifications of bargaining representatives. In addition, Regional Directors are authorized to obtain compliance with Board and court decisions, and they are responsible for the administrative management of their offices. See National Labor Relations Board Organization and Functions, Section 203.1, 32 Fed. Reg. 9588, 9589 (1967).

In accordance with the statutory provisions governing the Senior Executive Service, the Board developed an

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[2]"Career reserved" positions are those SES positions required to be filled by a career appointee (5 U.S.C. 3132(a)(4)). The statute provides that "a position shall be designated as a career reserved position only if the filling of the position by a career appointee is necessary to ensure impartiality, or the public's confidence in the impartiality, of the Government" (5 U.S.C. 3132(b)(1)).

appraisal system for Regional Directors that was approved by OPM.[3] Under the Board's appraisal plan Regional Directors are rated at one of four overall levels ranging from "highly successful" to "unsatisfactory." The overall appraisal is determined from numerical ratings in each of four "critical elements": (1) effectiveness and efficiency of performance; (2) quality of casehandling; (3) achievement of agency objectives; and (4) staff relations, including development and training of subordinates (Pet. App. 26-34). The ratings under each element in turn depend on the extent to which a Regional Director achieves certain specified goals. Performance under each of the critical elements is of equal importance in the overall evaluation (*id.* at 26).

Under critical element I—effectiveness and efficiency of performance—a Regional Director is evaluated on how well he attains certain time targets, expressed as a median number of days, in the performance of various responsibilities such as issuing a complaint in unfair labor practice cases, conducting elections, and issuing decisions that may be required at various stages in representation proceedings. Critical element I also sets out percentage goals for the achievement of settlement agreements in unfair labor practice cases and agreements concerning the conduct of elections in representation cases. Pet. App. 29-31, 34-35.[4] The

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[3]The Board's initial appraisal system for Regional Directors was promulgated in May 1979 (see Pet. App. 187-204). The system was modified in February 1981 (*id.* at 209-210) and modified again in minor respects in April 1982 (*id.* at 205-208). At all times relevant here, the system in effect was as set forth in the 1981 and 1982 modifications (see *id.* at 26-35).

[4]The standards under critical element I generally predate the establishment of the SES and most have been part of the Board's administrative policy since 1959. See Supplemental Appendix Filed By The Board in the Court of Appeals 41-46; see also DeSio & Higgins, *The Management and Control of Case Handling, Office of the General Counsel, NLRB,* 2 The Bureaucrat 385, 389-390 (1974).

determination of a Regional Director's success in satisfying the specific performance factors under critical element I includes consideration of any extenuating circumstances that may affect meeting the various targets.[5] Thus, the numerical rating under critical element I represents a judgment about the Regional Director's achievement of time targets in light of the total circumstances in which the Region is required to perform. A Regional Director is not guaranteed a specific number of points by the achievement of any particular targets.

Under critical element II—quality of casehandling—regional office files are reviewed to determine the completeness of investigations, to determine whether actions taken in cases are in "conformity with law, Agency regulations, policies, and procedures," and to assess the quality of the legal documents (such as settlement stipulations, pleadings, and complaints) issued by a Region (Pet. App. 31-32). The quality of a Regional Director's legal decisions in both unfair labor practice and representation cases, and the extent to which those decisions are reversed on appeal to the Board, are also considered (*id.* at 32). Under critical element III—meeting agency objectives—Regional Directors are assessed on their performance in maintaining good relations with the public, conforming to the Board's administrative policies and regulations, using staff appropriately,

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[5]Extenuating circumstances that are considered include the following (Pet. App. 29 n.1):

> [S]erious travel problems; Suboffices; Regional Office understaffed; handling of exceptionally time-consuming case(s); large number of priority cases; exceptionally inclement weather (snow, etc.); exceptionally inexperienced professional staff; highly significant improvement in overall performance; exceptionally large numbers of supervisors and Regional management used for Agency training purposes; excessive number of foreign-speaking persons involved in case(s); and size of Regional Office staff.

and supporting agency programs (Pet. App. 33). Finally, critical element IV assesses a Regional Director's performance in implementing the Board's equal employment opportunity plan, the collective bargaining agreement with Board employees, and the staff relations program, including training (Pet. App. 33-34).

Consistent with the statutory SES requirements, a Regional Director must achieve an overall rating of either "highly successful" or "fully successful" to be eligible for a performance award. A performance award is not, however, necessarily granted to a Regional Director who has achieved such a rating, and an award may be granted to a Regional Director who has attained fewer points than another eligible Regional Director who does not receive an award.

2. The Board, in entering orders in the instant cases, rejected petitioners' contention that the SES provisions as applied in the appraisal and compensation of Regional Directors create an unconstitutional risk that Regional Directors will be biased on issues that come before them because of the inclusion of efficiency of decisionmaking among the factors to be considered in the evaluation process (Pet. App. 36-63, 64-84, 85-101). The Board relied (Pet. App. 91-92 n.2) on its prior decision rejecting the identical challenge in *French Hospital Medical Center*, 254 N.L.R.B. 711 (1981). In *French Hospital* the Board noted (*id.* at 711 n.3):

> [A]ll the Regional Director[s'] rulings are subject to review by the Board, the members of which are not in the Senior Executive Service. Also, the rapidity with which representation cases are processed is but one of

many factors considered under the Senior Executive Service compensation plan.[6]

3. The court of appeals enforced the Board's orders (Pet. App. 1-17).[7] The court stated that petitioners' "claim that

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[6]While the proceedings before the Board were pending, petitioners Ohio New and Rebuilt Parts, Inc., and Canton Health Care Center, Inc., filed suit in the United States District Court for the District of Columbia seeking to enjoin the proceedings on the ground that the SES provisions, both on their face and as applied to Regional Directors, violate due process and equal protection. The court dismissed the suit, *Canton Health Care Center, Inc.* v. *United States,* No. 82-2511 (D.D.C. Oct. 31, 1983) (unpublished decision) (see Pet. App. 9-13), and the court of appeals affirmed without opinion, 750 F.2d 1093 (D.C. Cir. 1984).

The district court found that, insofar as petitioners sought to challenge the SES system on its face or as applied to federal employees other than Board employees, they lacked standing to do so because they "fail[ed] entirely to allege any injury * * * as a result of the government-wide implementation of the S.E.S. program" (see Pet. App. 10). With respect to petitioners' challenge to the program as applied to Regional Directors, the court held that petitioners were required to exhaust their administrative remedies before the Board but that, in any event, petitioners' "substantive challenge to the S.E.S. compensation scheme is patently without merit" (see Pet. App. 11). The court noted that "[t]he primary thrust of plaintiffs' complaint appears to be * * * that the financial interest which [a Regional Director] may have in the speed with which he processes [cases] results in a risk of bias 'for or against any issue presented' " (*ibid.*). The court found that, although "[j]udicial and administrative adjudicators may not, consistently with due process, have a financial interest in the matter which is the subject of * * * administrative proceedings[,] * * * an administrator does not have such interest merely because he may be motivated to resolve proceedings themselves expeditiously" (*ibid.* (footnote omitted)). Moreover, the court noted that "the speed at which matters are resolved is only one factor among several in the S.E.S. incentive awards system" (*id.* at 12). The court concluded that "it seems that due process guarantees would more likely be violated if administrators had no incentive to process matters efficiently and with an emphasis on quality than is true under the present scheme" (*ibid.*).

[7]The three cases were consolidated for appeal, and petitioners stipulated that they were not disputing the factual findings or legal

the first [critical] element tempts the Regional Director to dispose of matters with reckless speed in an effort to earn a 'performance award' * * * ignores the fact that the second, third and fourth critical elements" are given equal weight in the evaluation process (*id.* at 16). Moreover, the court found that petitioners' reliance on cases in which a quasi-judicial or judicial officer has a direct financial interest in the substantive outcome of his decisions was misplaced, because "[t]here is no showing that Regional Directors have any comparable possibility of a financial stake in their decisions" (*id.* at 15-16).

ARGUMENT

Petitioners contend (Pet. 24-52) that the SES provisions are unconstitutional as applied in the performance appraisal and compensation of the Board's Regional Directors because rewarding expedition in the processing of matters before the Board creates an unlawful risk of bias in the Board's decisionmaking process. This contention is plainly without merit and does not warrant review by this Court.

As the court of appeals noted (Pet. App. 15), there is "a strong and firm presumption that governmental officials [will] perform their functions without bias." See *Schweiker* v. *McClure,* 456 U.S. 188, 195 (1982); *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975); *United States* v. *Morgan,* 313 U.S. 409, 421 (1941). Petitioners have made no demonstration, either as a general matter or in the context of any of the three Board proceedings below, sufficient to overcome that presumption. First, even if we assume arguendo that Regional Directors are required to place an undue emphasis

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conclusions underlying the Board's orders, but rather were seeking only to challenge the constitutionality of the Board's SES appraisal system for Regional Directors (Pet. App. 2, 17).

on speed, it is not apparent why that emphasis impels them to any particular outcome, *i.e.*, results in *biased* decision-making. Second, and more important, there is no basis for petitioners' premise that the SES system leads to undue emphasis on expedition. The contention that a Regional Director might possibly be motivated by the time targets in critical element I to subvert the decisionmaking process or to reach a particular substantive outcome simply overlooks that a Regional Director is ultimately evaluated, not on his achievement of particular time targets, but rather on his overall performance in reaching fair and reasoned decisions that on their merits are consistent with the principles and policies of the National Labor Relations Act.[8]

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[8]As noted above, the time targets in critical element I serve only as goals, the achievement of which is to be considered in light of any extenuating circumstances. A Regional Director is not guaranteed a particular rating under that critical element by achieving or failing to achieve any particular time target. Moreover, the time targets themselves are expressed in terms of a median number of days in which certain actions should be taken, and therefore they do not require that a Regional Director meet a time deadline in any particular case.

Indeed, in each of the three cases involved here the Region took more time than the prescribed median in processing particular aspects of the case. For example, while critical element I provides that decisions required prior to elections should be made within a median of 45 days from the filing of a petition and that elections themselves should be conducted within a median of 50 days from filing (Pet. App. 35), the Region's Decision and Direction of Election in *Canton Health Care Center* did not issue until 99 days from filing of the petition, and the election itself was conducted 131 days from filing (C.A. App. A166-A169, A183). Similarly, an election in *Ohio New and Rebuilt Parts, Inc.*, was conducted 67 days after the petition was filed, and in *Colonial Gardens Care Center* the election was held 63 days from the filing of the petition (C.A. App. A73, A74, A97, A113). Thus, the circumstances of the very cases involved here belie petitioners' contention that the SES system induces a Regional Director to manipulate the processing of a case simply in order to meet a time target in critical element I.

Petitioners rely (Pet. 24-28) on decisions of this Court finding a violation of due process where judicial or administrative officers have either a direct financial interest or the possibility of such an interest in the substantive outcome of matters that come before them.[9] But those decisions do not indicate any constitutional problem where, as here, an administrator is motivated simply to resolve the proceedings themselves in a timely and efficient manner. The Board's concern that matters before it be resolved in a timely fashion and with an emphasis on quality is consistent with due process and furthers Congress's expressed judgment that employee rights under the Act be vindicated in expeditious fashion. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477-479 (1964); *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409-410 & n.2 (1940). Indeed, more generally, it cannot be doubted that it is desirable that rewards for government officials, either monetary or in the form of promotions, be based on superior performance.[10] It cannot seriously be maintained that efficiency is not an important ingredient in assessing

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[9]See *Tumey* v. *Ohio*, 273 U.S. 510, 531 (1927) (mayor's salary was paid in part by fees and costs levied by him while acting in a judicial capacity); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (fines and costs levied in a mayor's court accounted for a substantial portion of municipal revenues and mayor was responsible for village finances); *Gibson* v. *Berryhill*, 411 U.S. 564, 578-579 (1973) (where members of state board of optometry were all optometrists in private practice they were constitutionally disqualified from revoking licenses of a substantial number of their competitors since a reduction in the number of optometrists in the market "would possibly redound to the personal benefit of members of the Board").

[10]Although petitioners' contention here is limited to SES employees, it is not apparent why the principle they advocate would not apply to any decisionmaker whose performance rating was based in part on efficiency, even if he is outside the SES system—or even to a claim that a decisionmaker resolved a particular case with undue expedition (without regard to whether it could affect his performance rating).

performance and that a decisionmaker who allows cases to languish on his docket for years should be treated as doing his job as well as one who decides his cases expeditiously (see Pet. App. 12).[11]

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[11]Petitioners' contention (Pet. 52-59) that they were improperly denied an opportunity "to develop a factual record" on the constitutionality of the SES system in the *Canton Health Care Center* representation proceeding, and therefore that neither the Board nor the court of appeals could give proper consideration to their legal contentions, is without merit. Petitioners had adequate opportunity to raise their contentions in each of the Board proceedings and did so (see, *e.g.*, Pet. App. 91-92 n.2). The decision of the hearing officer in *Canton Health Care Center* (see Pet. App. 213, 227) not to take additional unspecified evidence in support of petitioners' constitutional claim, in a hearing the purpose of which was to settle certain issues precedent to conducting a representation election in an appropriate bargaining unit, was under the circumstances a reasonable one. The trier of fact has broad discretion to limit the scope of the proceedings and to deny the admission of marginally probative evidence where its admission would appear to be a waste of time and lead to undue delay. See Fed. R. Evid. 403; 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[06] (1985); *McCluney* v. *Joseph Schlitz Brewing Co.*, 728 F.2d 924, 928-929 (7th Cir. 1984) (evidence properly excluded where it would have consumed a great deal of time and had very slight probative value).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

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